

No. 11563

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

VS.

KENYON J. SCUDDER, Superintendent
of the California Institution for Men.
Located at Chino, California,

Appellee.

APPELLEE'S BRIEF

FRED N. HOWSER,
Attorney General

FRANK W. RICHARDS,
Deputy Attorney General
600 State Building
Los Angeles 12, California
Attorneys for Appellee

TOPICAL INDEX

	Page
STATEMENT OF CASE-----	1-3
QUESTION PRESENTED-----	4
SUMMARY OF ARGUMENT-----	4-5
ARGUMENT -----	5
I. -----	5-9
A. Exhaustion of State Remedies-----	5-7
B. Habeas Corpus Cannot be Employed as Substitute for Writ of Error-----	8-9
II. RIGHT OF APPEAL-----	9-11
III. PENAL CODE SECTION 182-----	11-13
IV. EXISTENCE OF CONSPIRACY-----	14
V. OTHER OFFENSES-----	15
CONCLUSION -----	16

LIST OF AUTHORITIES CITED

CASES

	Page
Application of Gordon, 157 F. 2d 659_____	3, 8, 11
Burall v. Johnson, 134 F. 2d 614_____	8
Central Land Co. of West Virginia v. Laidley, 159 U. S. 103, 16 S. Ct. 80_____	10
Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649_____	8
Ex parte Converse, 137 U. S. 624, 11 S. Ct. 191_____	9
Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448_____	5
Ex parte Melendez, 98 F. 2d 791_____	7
Ex parte Quirin, 317 U. S. 1, 63 S. Ct. 2_____	9
Felts v. Murphy, 201 U. S. 123, 26 S. Ct. 366_____	8
Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582_____	9
In re Bell, 19 Cal. (2d) 488_____	12, 13
In re Marvich, 27 Cal. (2d) 503_____	7
In re Miller, 126 F. 2d 826_____	7
In re Mooney, 10 Cal. (2d) 1_____	7
In re Peppers, 189 Cal. 682_____	12
In re Ward, 28 A.C. 595_____	7
Kramer v. State of Nevada, 122 F. 2d 417_____	7
Lisenba v. People of State of California, 314 U. S. 219, 62 S. Ct. 280_____	15
Makowski v. Benson, 158 F. 2d 158_____	7
Milk Wagon Drivers Union etc. v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552_____	11
People v. Gordon, 71 Cal. App. (2d) 606_____	2, 12, 14, 15
People v. Pace, 73 Cal. App. 548_____	12
United States v. Ragen, 146 F. 2d 349_____	9, 10
Urquhart v. Brown, 205 U. S. 179, 27 S. Ct. 459_____	7
Valentina v. Mercer, 201 U. S. 131, 26 S. Ct. 368_____	8
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220_____	10
White v. Ragen, 324 U. S. 762, 65 S. Ct. 978_____	5, 6
Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363_____	6
Woods v. Nierstheimer, 328 U. S. 211, 66 S. Ct. 996_____	6
Worcester County Trust Co. v. Riley, 302 U. S. 292, 58 S. Ct. 185_____	10

STATUTES

California Constitution, Article I, Section 13_____	13
Constitution of the United States_____	9, 10
Constitution of the United States, Fourteenth Amend- ment _____	4, 5, 9, 10, 13
Penal Code, Section 182_____	4, 11, 12, 13
Penal Code, Sections 950, 951 and 952_____	12

No. 11563

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

for the

NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

v.

KENYON J. SCUDDER, Superintendent
of the California Institution for Men.
Located at Chino, California,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF CASE

James M. Gordon, appellant, and Harry White were indicted on the fourteenth day of March, 1944, by the Los Angeles County Grand Jury and accused in Count one of conspiracy to cheat and defraud by criminal means and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, and to commit grand theft. In Counts Two to Eight inclusive, they were accused of the substantive offenses

of grand theft. The jury found them guilty on all counts. White was placed on probation and appellant was sentenced to imprisonment in the state prison for the term prescribed by law, the sentences on the grand theft counts were ordered to run concurrently but consecutively with the sentence on the conspiracy count (R. 31, 32).

An appeal was taken by James M. Gordon from the judgments of conviction to the District Court of Appeal, Second Appellate District of the State of California, which affirmed the convictions on all counts. (R. 32; *People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. 2d 110.) A rehearing was denied and a hearing by the Supreme Court of California was also denied. (R. 5.)

A motion was made in the said district court of appeal to recall its remittitur, which was denied, and the Supreme Court of California denied a hearing on said motion. (R. 5, 6.)

An application for a writ of habeas corpus was filed with the Supreme Court of California, which was denied without opinion. (R. 7.)

An application for a writ of habeas corpus was filed with the District Court of the United States in and for the Northern District of California, which was denied, and the issuance of an order to show cause why a writ of habeas corpus should not issue was also denied. (R. 30.) An application for a certificate of probable cause for appeal was denied by said court

(R. 90), and a like application was denied by Honorable William Denman, Judge of the United States Circuit Court of Appeals, Ninth Circuit. (R. 96; *Application of Gordon*, 157 F. 2d 659.)

An application for a writ of habeas corpus, allegedly upon the same grounds set forth in the application filed with the District Court of the United States in and for the Northern District of California, was filed with the District Court of the United States in and for the Southern District of California (R. 30), following the removal of James M. Gordon from San Quentin Prison, Marin County, California, to the Institution for Men at Chino, San Bernardino County, California. (R. 2, 29, 96.)

An order to show cause was issued why a writ of habeas corpus as prayed for should not issue. (R. 87.) After the matter was duly and regularly heard and fully presented by the filing of points and authorities and oral argument, the court rendered a memorandum of conclusions and made an order discharging the order to show cause and denying the application for a writ of habeas corpus. (R. 93, 95, 97.) An application for a certificate of probable cause for appeal was denied by said court (R. 106), but granted by Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit. (R. 109, 110.) An appeal was then taken from the order denying the issuance of a writ of habeas corpus and discharging the order to show cause. (R. 107.)

QUESTION PRESENTED

Did the lower court abuse its discretion in discharging the order to show cause and denying the issuance of a writ of habeas corpus?

SUMMARY OF ARGUMENT

1. The fact that the Supreme Court of the State of California denied appellant's application for a writ of habeas corpus without rendering an opinion was not a good, sufficient or legal reason for the filing of a similar application with the United States District Court without first seeking a review by the Supreme Court of the United States, unless the alleged facts showed a case of peculiar urgency why the writ should issue by a federal court.

2. The constitutional or statutory right of appeal, guaranteed by the Fourteenth Amendment of the Constitution of the United States, is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence.

3. Appellant's petition for a writ of habeas corpus filed with the Supreme Court of California is without averment that Section 182 of the Penal Code, defining criminal conspiracy, is unconstitutional and void as violative of any provision of the federal Constitution. (R. 42.)

4. The allegation in appellant's petition for a writ of habeas corpus filed with the Supreme Court of

California, "That the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment" presented no federal question. (R. 46.)

5. The introduction of evidence tending to show the commission by appellant of other offenses of which he was not accused did not breach the Fourteenth Amendment of the Constitution of the United States. (R. 48.)

ARGUMENT

I

A. Exhaustion of State Remedies.

The rule is that an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in the Supreme Court of the United States by appeal or writ of certiorari, have been exhausted.

Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 450;

White v. Ragen, 324 U. S. 762, 65 S. Ct. 978, 981.

An exception to the above rule is where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based upon some other adequate non-federal ground. In such cases it is unnecessary for

the petitioner to ask the Supreme Court of the United States for certiorari in order to exhaust his state remedies, since that court would lack jurisdiction to review the decision of the state court and the denial of certiorari would not preclude a district court from inquiring into the federal question presented to, but not considered by, the state court.

White v. Ragen, 324 U. S. 762, 65 S. Ct. 978, 981;
Woods v. Nierstheimer, 328 U. S. 211, 66 S. Ct. 996, 998.

But where habeas corpus is available under the state practice and the petition is based upon state and federal grounds and is denied by the state court without opinion and it appears from an examination of the record that the state grounds are insubstantial, it will be presumed that the state court based its judgment on the law raising the federal question, and the Supreme Court of the United States will take jurisdiction.

Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 367.

Another exception to the above rule is in cases of peculiar urgency, such as cases “involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations.” In cases where peculiar urgency is not shown to exist why the writ should issue, the federal courts will generally leave the petitioner, after a final determination of the case by the state court, to his remedy by writ of error from the

Supreme Court of the United States because of the exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom.

Urquhart v. Brown, 205 U. S. 179, 27 S. Ct. 459, 460;

See, *Ex parte Melendez*, 98 F. 2d 791, 792;

Kramer v. State of Nevada, 122 F. 2d 417, 419;

In re Miller, 126 F. 2d 826;

Makowski v. Benson, 158 F. 2d 158.

The remedy of habeas corpus is available in the State of California for the protection and enforcement of constitutional rights even where questions of fact are raised by the petition. In such cases a referee is appointed by the Supreme Court of California to take evidence and submit findings.

In re Ward, 28 A. C. 595, 170 Pac. 2d 665;

In re Marvich, 27 Cal. (2d) 503, 165 Pac. 2d 241;

In re Mooney, 10 Cal. (2d) 1, 15, 73 Pac. 2d 554, 561.

That the state grounds urged by appellant in his petition for a writ of habeas corpus filed with the Supreme Court of California are insubstantial clearly appears from the petition and the points and authorities filed therewith. We shall discuss these matters later under Points III and IV.

B. Habeas Corpus Cannot be Employed as Substitute for Writ of Error

The question for determination upon this writ is simply one of jurisdiction and it cannot perform the function of a writ of error.

Felts v. Murphy, 201 U. S. 123, 26 S. Ct. 366, 368;

Burall v. Johnson, 134 F. 2d 614;

Application of Gordon, 157 F. 2d 659.

If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost jurisdiction, an application for a writ of habeas corpus is properly denied. A writ of this nature cannot perform the function of a writ of error.

Valentina v. Mercer, 201 U. S. 131, 26 S. Ct. 368, 370.

Habeas corpus proceedings are confined to the examination of fundamental and jurisdictional questions, and the writ cannot be employed as a substitute for a writ of error.

Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649, 651.

Even though the federal court may disagree with the state court over the sufficiency of the evidence, no relief can be given for two reasons; first, the federal court may not review in a habeas corpus proceedings errors of law committed by the state court; secondly whether there was evidence to support the verdict involves the guilt or innocence of the accused, with

which on habeas corpus the federal courts are not concerned.

United States v. Ragen, 146 F. 2d 349, 351.

In *Ex parte Quirin*, 317 U. S. 1, 63 S. Ct. 2, 9, it is stated:

“While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner.
* * *”

II

RIGHT OF APPEAL

The constitutional or statutory right of appeal, guaranteed by the due process clause of the Fourteenth Amendment of the Federal Constitution (*Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 587), is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence.

A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Ex parte Converse, 137 U. S. 624, 11 S. Ct. 191, 193.

Where the accused receives a fair and impartial trial in a court of competent jurisdiction, whose jurisdiction was never lost or disturbed at any stage of the proceedings, that is due process.

United States v. Ragen, 146 F. 2d 349, 351,
Certiorari denied, 65 S. Ct. 1194.

The Constitution of the United States does not guarantee that the decision of state courts shall be free from error.

Worcester County Trust Co. v. Riley, 302 U. S.
292, 58 S. Ct. 185, 188.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States.

Central Land Co. of West Virginia v. Laidley,
159 U. S. 103, 16 S. Ct. 80, 83.

Federal courts do not sit to review the finding of facts made in the state court, but accept the findings of the court of the state upon matters of fact as conclusive and confine their review to questions of federal law within the jurisdiction conferred upon them.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86,
29 S. Ct. 220, 221.

In *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552, the Supreme Court of the United States, at page 555, said:

“* * * The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. * * *”

In the *Application of Gordon*, 157 F. 2d 659, 660, it is said:

“* * * In respect to the grand theft counts, the prisoner maintains that on his appeal to the District Court of Appeal for the State of California that court, in its opinion, misstated the facts and so decided the case improperly. Since, however, the facts so misstated supported the legal points held by the California District Court of Appeal, the Supreme Court of the State of California refused to grant a hearing under its rule that a hearing after a decision by the District Court of Appeal would be granted only if the law there expressed was incorrect as applied to the facts as set forth in the opinion. *People v. Davis*, 147 Cal. 346, 81 P. 718. This statement, if correct, indicates no more than error in the course of appeal. * * *”

III

PENAL CODE SECTION 182

In appellant's petition for a writ of habeas corpus filed with the Supreme Court of the State of California it is alleged that Section 182 of the Penal

Code is unconstitutional and void in that it does not contain a definition of the clause “to cheat and defraud any person of any property, by any means which are in themselves criminal” nor does it establish the elements constituting such crime; and is vague and uncertain. It is also alleged that the judgment of conviction on the conspiracy count was and is void in that the verdict of the jury does not disclose whether defendant was found guilty of a conspiracy to cheat and defraud by means which are in themselves criminal, or a conspiracy to obtain money or property by false pretenses, or of a conspiracy to obtain money or property by false promises with fraudulent intent not to perform such promises, or of a conspiracy to commit grand theft. (R. 42.) *In re Bell*, 19 Cal. (2d) 488, *In re Peppers*, 189 Cal. 682, and *People v. Pace*, 73 Cal. App. 548, were cited by appellant in support of said contentions. (R. 60.)

From an examination of the opinion of the District Court of Appeal, Second Appellate District, of the State of California, rendered on the appeal (*People v. Gordon*, 71 Cal. App. (2d) 606; 163 Pac. 2d 110, it appears that no contention was made that Section 182 of the Penal Code was unconstitutional, but that it was contended that the indictment failed to charge a public offense in that it does not conform with the provisions of Sections 950, 951 and 952 of the Penal Code and that if such sections have been complied with they are unconstitutional in that appellant has been denied due process of law guaranteed

by the Fourteenth Amendment of the Federal Constitution, and California Constitution, Article I, Section 13.

Since the validity of Section 182 of the Penal Code was presented to the Supreme Court of the State of California by habeas corpus, it was unnecessary for the Supreme Court in such proceeding to consider whether said clause in said code section was unconstitutional because of uncertainty or vagueness or otherwise. This clearly appears from the ruling of the Supreme Court in the matter of *Bell*, supra, 19 Cal. (2d) 488; 122 Pac. 2d 22. In that matter it was held (page 505) that,

“Because petitioners have failed to sustain the burden of proving that they were not convicted of one valid provision of the ordinance prohibiting acts of violence, the writ heretofore issued is discharged and the petitioners are remanded to the custody of the sheriff of Yuba County.”

If the constitutional question presented in the instant case had been raised on appeal, then the court, in the event said clause was held unconstitutional, could have reversed the judgment on that count and ordered a new trial without discharging appellant from custody or affecting his conviction on other counts predicated upon valid statutes.

It is thus apparent that this state ground was and is insubstantial.

IV

EXISTENCE OF CONSPIRACY

The allegation in the petition for a writ of habeas filed with the Supreme Court of California, that the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment (R. 46), presented no federal question. It was a matter solely for decision on the appeal by the state courts. The District Court of Appeal said: (*People v. Gordon*, 71 Cal. App. (2d) 606, 629)

“* * * It is true that the evidence does not show that all of the fraudulent acts were within three years from the return date of the indictment, but such showing is not essential to the competency of the evidence. A conspiracy may be proved by evidence of its gradual formation, of acts which occurred long anterior to the criminal compact. (Citing authority) Therefore the sales to Conger, Wastlund and the Winstons more than three years prior to the indictment were evidence of the conspiracy.”

From the narration of the evidence set forth in the opinion of the said District Court of Appeal, it is reasonable to conclude that the court found that the conspiracy existed within three years of the return of the indictment. Therefore, this matter was and is insubstantial.

V

OTHER OFFENSES

The allegation in the petition for a writ of habeas corpus filed with the Supreme Court of California, that defendant James M. Gordon was denied his constitutional right to a fair and impartial trial guaranteed by the Fourteenth Amendment in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused, lacked all semblance of merit. (R. 48.)

In *Lisenba v. People of State of California*, 314 U. S. 219, 62 S. Ct. 280, it is stated at page 286:

“Testimony was admitted concerning the death of James’ former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system. The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State’s law.”

The District Court of Appeals of California upheld the introduction of such evidence on the grounds that it showed intent, plan and scheme to defraud, and knowledge of the falsity of the representations made to the vendees named in the accusation. (*People v. Gordon*, 71 Cal. App. (2d) 606, 632.)

CONCLUSION

For the foregoing reasons the District Court of the United States did not abuse its discretion in discharging the order to show cause and denying the issuance of a writ of habeas corpus.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the
State of California

FRANK W. RICHARDS,
Deputy Attorney General
Attorneys for Appellee.